

Jan 25
-115
The KING *versus* TANDY. Ct 27

PROCEEDINGS

ON THE

TRIAL

OF

JAMES NAPPER TANDY, Esq.

IN THE

Court of King's Bench.

Before the Right Honourable

LORD CHIEF JUSTICE CLONMELL,

The Hon. Mr. Justice BOYD, and the Hon. Mr. Justice HEWITT,

Upon an Indictment for

Sending a CHALLENGE

TO

JOHN TOLER, Esq.

HIS MAJESTY'S SOLICITOR GENERAL,

DUBLIN; PRINTED FOR

Messrs. P. BYRNE AND J. MOORE.

M. DCC. XCII.

THE KING'S COURT

Intro - false reasoning

P-6- a/bm

7- False Hgts to build 2. Kinder

25- Def- family 3 people
in a 10th side

31- James NAPIER TANDY, Esq.

Warrantable Verdict

Court of King's Bench

Recd Jan 19 1906

LORD CHIEF JUSTICE GLOUCESTER

The Hon. Mr. Justice BOWEN and the Hon. Mr. Justice RUSSELL

Upon an indictment for

Securing a CHALLENGE

TO

JOHN TOLLER

HIS MAJESTY'S POLICE OFFICER

DUBLIN: PRINTED FOR

Messrs. P. BYRN and J. MOORE

M. DCC. XCII

Introduction.

HOW far juries have a right to determine upon the *law*, as well as upon the *fact*, in criminal prosecutions, is a subject which has frequently employed the minds of jurists, and a fair discussion of the subject must ever be acceptable to those who admire and revere a form of trial upon the existence of which depends the rights and liberties of this country.

The prosecution of Mr. Tandy, by the Attorney General, by order of the House of Commons, has again called this right of juries in question, and this summary argument is written for the purpose of convincing those who have not time to consider such subjects, that the twelve honest citizens who acquitted Mr. Tandy, in so doing exercised a right which can never be destroyed but with the liberties of their country.

They

They decided against the opinions of the three Judges, not only on the points of law, which resulted from the evidence offered, but against the charges given by those judges on the fact; and in doing so they did right, *conscience* being the only dictator to which a juror is bound to attend.

An indictment properly framed, not only sets forth the particular fact charged to have been committed by the party accused, but also specifies the nature of the crime. Thus treasons are said to be done *traiterously*. Felonies to be committed *feloniously*. Public libels to be published *seditionously*. And private libels *maliciously*.

When the jurors, therefore, are impanelled upon the trial of a person charged with high treason, they are to try not only whether he is guilty of the fact of corresponding with the enemy (or whatever the species of treason may be) but whether he is guilty of having corresponded with the enemy *traiterously* or not.

When they are impanelled upon the trial of a person charged with a felony, they are to try not only whether he *killed* such a one; or *took* such an one's property, but whether he *killed* such an one of *malice prepense* or took such an one's property *feloniously*.

In like manner if they are impanelled at the trial of a public libeller, they are to try not only whether he published such a writing, but whether

whether he published it seditiously or not; and in case of a private libel whether he published it *maliciously* or not.

This right of juries to decide upon the *intention*, in case of libels was long contended in England, but by a late act of the legislature it is now fully declared and recognized to belong to them only.

In short, in all the above cases it seems from the words of the issue, that jurors are to try not only the *fact*, but the *crime*; in other words they are to judge, not only of the *act done*, but of the *indictment for doing such act*, and to determine whether it be of the criminal nature set forth in the indictment.

It may be concluded not only from the general frame of indictments, but from the nature of the verdict in particular cases, that the jury are vested with the power of privilege upon the law as well as the fact, which are indeed so complicated in the instance before alluded to, that it is difficult if not impossible to separate the one from the other.

In indictments for *murder* the jury may find the prisoner guilty of the fact of having killed the deceased but not of having killed him of malice *prepenſe* and may consequently find him guilty of *Man slaughter* only, by which verdict they decide upon the law as well as the fact.

Many writers indeed seem to incline to the opinion that juries are to determine upon the law as well as the fact. Lord Chief Justice *Hale* says in his History of the Common Law, "as the jurys *assists* the judge in determining matter of fact, so the Judge *assists* the Jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are judges," these words imply that the determination is in the jury after having received the proper *assistance* from the Judge.—

And again Lord *Hale* in the 2d. book of his Pleas of the Crown, page 313. says, that the conscience of the jury must pronounce the prisoner guilty or not, for to say the truth, it were the most unhappy case that could be to the Judge, if he at his peril must take upon him the guilt or innocence of the prisoner, and if the Judges opinion must rule the matter of fact, the tryal by jury would be unnecessary.— The learned author of the Commentaries in the Law of England book, 4 p. 354, says, that special verdicts set forth all the circumstance of the case and pray the judgment of the Court whether for instance it be murder, manslaughter, or no crime at all.—

This is where the jury *doubt* the matter of *law* and therefore chuse to leave it to the determination of the Court, though they have an unquestionable right of determining upon all the

the circumstance and finding a general verdict if they think proper so to hazard, a breach of their oaths, &c. &c.

It must be owned, as has been already observed, that it appears to be at first sight, a preposterous allegation to appoint twelve illiterate, and perhaps the greatest part of them ignorant men, to be the ultimate expositors of the law, with a power to controul and overrule the opinions and directions of the Judges, who have made the science of jurisprudence their study, and have been raised to the seat of judgment, for their knowledge and abilities in their profession.

But many things on a slight and transient inspection carry the appearance of absurdity, which may be reconciled upon a close examination. It lies not within the reach of human wisdom to provide remedies against every evil contingency; the most it can do is, to avoid the greater evil, and perhaps upon a more mature consideration, it will be thought the lesser inconvenience that the Jury should, after receiving the advice and assistance of the Judge as to the law, take under their consideration all the circumstances of the case, and the intention with which the act was done, and determine upon the whole, whether the fact is, or is not, within the meaning of the law.

If

If the Judge who expounds the law had the power of determining to his own exposition, might not an inlet be opened for arbitrary and partial decisions? might not the Judge, likewise, as well be entrusted to decide concerning the evidence of the fact, for as has been observed, he might by a latitude of construction bring the fact within the severity of the law and in either of the cases might do manifest injustice.

Thus the life and liberty of the subject might depend on the decision of one man, who might possibly in some cases be more likely to be biassed than 12 Jurors totally indifferent to the parties concerned, who are sworn to give a true verdict, and must do it under the peril of a heavy punishment, and whose duty it is to receive the advice and assistance of the Court, and to state to the Judges their doubt and difficulties if any should appear.

Is there not less to be apprehended from occasional mistakes of judgment in 12 Jurors, than the possibly of error of judgment or of will in the judge who whatever be his knowledge or probity, is but a man.

Besides it does not in truth often happen, that the Jury disregard the advice and direction of the Judge, the opinion of the bench has generally its due weight, and though jurors now
and

and then give erroneous verdicts contrary to the opinion of the court, yet their error may in some cases be rectified.

Though the practice of punishing a jury by attaint for bringing in a verdict contrary to law, has of late years been disused, yet in civil cases a method more effectual to redress the wrong, has been substituted, which is that of making application to the Court, who, according to the circumstances, will grant a new trial, so that the party injured by their wrong finding is not without a remedy.

If this wrong verdict, indeed, respects a criminal matter, a failure of justice in one instance seems unavoidable, for if they acquit the guilty prisoner he cannot be brought to trial again for the same offence; but should they condemn him wrongfully, the case is not altogether without a remedy, for the Court of King's Bench may grant a new trial, where the Jury have found the prisoner guilty contrary to the evidence, and our constitution has wisely lodged a power in the Crown to remit the sentence.

...the Court, who, according to the Constitution, will grant a writ of habeas corpus in such cases as may be presented to them.

[illegible]

PROCEEDINGS

ON THE

TRIAL

OF

JAMES NAPPER TANDY, Esq.

King's Bench. Trinity Term.

The KING *versus* TANDY.

The Right Hon. LORD CLONMELL, *Chief Justice.*

The Hon. Mr. BOYD,

The Hon. Mr. HEWET,

} *Justices.*

Mr. Justice DOWNER's declined sitting, having been a Member of the House of Commons, when it was ordered that the Attorney General should prosecute Mr. Tandy.

The following is the Pannel of the Gentlemen from amongst whom the Jury were sworn.

Alexander Jaffray
Abraham Wilkinson,
William Colville

A

Patrick Bride
Robert Shaw
George Palmer
Ephraim

Ephraim Hutchinson	John Minchin
John Lynam	George Payne
William Kilbee	Lewis Hodgson
Thomas White	William Rawlins
Jeffry Goff	Luke White
John Hendrick	Nath. Trumbull, Jun.
Charles Ward	James Bourliquot
George Macquay	Robert Lawe
William Rathborn	Hall Lamb
George Grierson	Wm. Harkness
Randal M'Donnel	Theo. Billing
John Westlake	Richard Fox
Price Blackwood	Drury Jones
Steven Stock	Thomas Myler
David Beatty	Christopher Ormsby
Jeffery Foote	William Allen
William Dickenson	James Blacker
Thomas M'Donnel	Phillip Bayly
John Lynam, Jun.	John Wilfon
George Overend	Robert Hanna
Thomas Read	Benjamin Clark
W. Alexander, Jun.	Bar. Maziere
Leland Crosthwaite	Bladen Swinny
George Digby	Charles Williams
John Ferns	Mer. Jenkin
John Lindsay	Wm. Hen. Archer
George Lunell	

J U R O R S.

Mr. John Lynam, Foreman	Mr. William Dickinson
Mr. Thomas White	Mr. The. M'Donnell
Mr. Wm. Rathborne	Mr. W. Alexander, jun.
Mr. Price Blackwood	Mr. John Lindsay
Mr. Stephen Stocke	Mr. George Lunell
Mr. Jeffery Foote	And
	Mr. John Minchin

COUN.

C O U N S E L

On the Prosecution.

Mr. Attorney General
 Mr. Prime Sergeant
 Mr. Hackett
 Mr. Frankland
 Mr. Whitestone

For the Traverser,

Mr. Recorder
 Mr. M'Nally
 Mr. G. J. Browne
 Mr. Tone
 Mr. Ridgeway
 Mr. Emmet

Thomas Kemmis, Esq. || Matthew Dowling, Esq.
 Solicitor for the Crown. || Agent for the Traverser.

*The Indictment was read by the Clerk of the Crown,
 and consisted of Seven Counts, viz.*

1st Count.—That JAMES NAPPER
 T A N D Y, Esq. being an evil disposed person,
 and a disturber of the peace of our Lord the King,
 and intending to do great bodily harm and mischief
 to John Toler, Esq. the Solicitor of our said Lord the
 King, and to provoke and incite him unlawfully to
 fight a duel with and against him, 22d February,
 32d King, at the city of Dublin unlawfully, wickedly,
 and maliciously, did send and cause to be sent and de-
 livered a certain written-challenge of and from him,
 to the said John Toler, unlawfully to fight a duel
 with and against him to the great damage and terror
 of the said John Toler, to the evil example of all o-
 thers in the like case offending and against the
 peace.

2d Count. And that he being such evil disposed
 person, and disturber of the peace, and designing and
 intending

intending to do great bodily harm and mischief to the said John Toler, and to provoke him unlawfully to fight a duel with and against the said J. N. Tandy, afterwards, on the same day, year and place, unlawfully wickedly, and maliciously, did send and cause to be sent a certain written challenge of and from him, to the said John Toler, and thereby unlawfully, wickedly and maliciously, did provoke and incite the said John Toler, unlawfully to fight a duel with and against him, to the great damage of the said John Toler, to the evil example of all others in like case offending, and against the peace.

3d Count.—And that he being such evil disposed person, and disturber of the peace, and unlawfully, wickedly, and maliciously designing and intending to do great harm and mischief to the said John Toler afterwards, on the same day, year, and place, in pursuance of and for the completing his said last mentioned malicious and wicked intent and design, unlawfully, wickedly, maliciously, did provoke, incite, and challenge, the said John Toler unlawfully to fight a duel, with and against him, the said J. Napper Tandy, to the great damage and terror of the said John Toler, to the evil example of all others in the like case offending and against the peace.

4th Count And that he being such evil disposed person, and disturber of the peace and intending to do great bodily harm and mischief to the said John Toler and to incite and provoke him unlawfully to fight a duel with and against him the said J. N. Tandy,

Tandy, afterwards on same day, year, and place unlawfully wickedly, and maliciously, did provoke and incite the said John Toler unlawfully to fight a duel with and against him, to the great damage of the said John Toler, to the evil example of all others in the like case offending, and against the peace.

5th Count.—And that he being such evil disposed person and disturber of the peace, and designing and intending to do great bodily harm and mischief to the said John Toler, and to incite and provoke him unlawfully to fight a duel with and against him, the said James Napper Tandy, afterwards, that is to say, 4th March 32 King at the city of Dublin, unlawfully wickedly, and maliciously did send and cause to be sent and delivered, a certain written challenge of and from him to the said John Toler, unlawfully to fight a duel with and against him to the damage and terror of the said John Toler, to the evil example of all others in like case offending, and against the peace.

6th Count.—And that he being such evil disposed person as aforesaid, and designing and intending to do bodily harm and mischief to the said John Toler, and to incite and provoke him unlawfully to fight a duel with and against the said James Napper Tandy, afterwards on the same day, year, and place last mentioned, unlawfully wickedly, and maliciously did send and cause to be sent and delivered a certain written challenge of and from him to the said John Toler and did thereby unlawfully, wickedly and maliciously, provoke and incite the said John Toler,
unlaw-

unlawfully to fight a duel with and against him, to the great damage of the said John Toler, to the evil example of all others in the like case offending, and against the peace.

7th Count.—And that he being such evil disposed person and disturber of the peace as aforesaid, and designing and intending to do great bodily harm and mischief to the said John Toler, and to incite and provoke him unlawfully to fight a duel with and against the said James Napper Tandy, afterwards, on the same day, year and place last mentioned, unlawfully, wickedly, and maliciously did provoke and incite the said John Toler unlawfully to fight a duel with and against him, to the great damage of the said John Toler, to the evil example of all others in the like case offending and against the peace.

Mr. Whitestone opened the Pleadings on the part of the crown.

Mr. Attorney Gen. Stated the case. He said that the traverser, Mr. Tandy, stood charged on seven counts for having sent Challenges to John Toler Esq. that on the 21st of February last Mr. Toler had dined abroad and did not return until between 2 and 3 o'Clock the preceding morning that on his entering his study he found several notes on his Table, among the rest one from a gentleman of the name of Mr. Smith, intimating, that he waited upon him with a letter or message, (did not know which for certain,) from Mr. James Napper

Napper Tandy. Apprehending that as Mr. Smith came from Mr. Tandy that the business might be something disagreeable, Mr. Toler called on Mr. Grace, a gentleman of high respectability who lived near him, and told Mr. Grace the circumstance of his having received the note from Mr. Smith, that it was agreed to receive any message Mr. Smith might have, at the house of Mr. Cuffe, and that Mr. Toler requested Mr. Grace would call upon Mr. Smith to that effect. Mr. Smith accordingly delivered a letter from Mr. Tandy to Mr. Toler at the house of Mr. Cuffe. I have, said the Attorney general, a copy of it. I confess I think the letter is fully explained by what followed,

(read the letter, for which see Mr. Toler's evidence.)

Mr. Tandy has the letter, and if I make any mistake he will have an opportunity to correct me, the letter bearing date the 22nd February. That Mr. Smith finding Mr. Toler would not give any explanation, said the consequences would be disagreeable, upon which Mr. Toler answered, he was prepared for the consequences. Mr. Toler read the letter, and wrote an answer.—*(read answer, see Mr. Toler's evidence.)* Mr. Smith then said, the time and place was to be of Mr. Toler's appointment, Mr. Toler answered, that with respect to time and place he only wished it was over, as part of his family was in a very delicate state, Mr. Smith then departed. Mr. Toler remained at Mr. Cuffe's house till Mr. Smith returned with an answer which was, that Mr. Tandy would not trouble him any longer in that line; that it was

no longer a private but a public affair; and Mr. Tandy would appeal to the newspapers; that Mr. Smith returned and there the matter rested. The House of Commons having been informed of the business they were pleased to direct Mr. Tandy to appear before them at their bar, but Mr. Tandy did not think fit to obey their order, and that the House were pleased to oblige the Attorney General to commence a prosecution against Mr. Tandy.—If these facts are clearly proved to you, gentlemen of the jury, by the witnesses, or any *one* or *two* of them—you certainly must convict Mr. Tandy, and who can feel any doubt upon their mind of his guilt? I declare I do not—The mind of every man must be convinced of the intention of Mr. Tandy, and I am convinced the judgment you will give, will be consistent with the oaths you have taken.

JOHN TOLER *Esq.* Examined by

MR. PRIME SERJEANT.

Q. Do you remember the 22d day of February last.

A. I do.

Q. Do you know James Napper Tandy *Esq.*

A. I do.

Q. Did you receive any note or message from him on that day?

A. I did.

Q. Can you take upon you to state the particulars to the Jury of what happened at that time.

A. I had

I had been out to dine on the 21st. and on my return home about 2 o'clock on the morning of the 22nd. I found a note in my study from a gentleman of the name of Smith, intimating that he had called on me from Mr. James Napper Tandy, and that he would call again at 10 o'clock the next morning.

Q. Did you send any answer to him?

A. I requested a Mr. Grace an intimate friend of mine, a gentleman of high honour to call on him and let him know any message he had, I would receive at the house of Mr. Cuffe.

Q. Did you meet Mr. Smith?

A. I did.

Q. Did you receive any letter from him?

A. I did.

Q. Do you know the hand writing of Mr. Tandy.

A. I do.

Q. Did you receive any letter from Mr. Smith, as from Mr. Tandy.

A. I did.

Q. Where did you see Mr. Smith?

A. At Mr. Cuff's.

Q. Do you believe that letter to be Mr. Tandy's hand writing? (*showing a letter*)

A. I do.

Q. Why

A. I have seen him write—I have received other letters from him.

Mr. Recorder, objected to the receiving of the letter as evidence. He said there is no evidence that the letter was delivered by Mr. Tandy to Mr. Smith, there is no proof of his having written it but by comparison of writing. Since the case of Al-

geron Sydney there has no evidence of comparison of writing been admitted, it can be no evidence against any man.—They certainly cannot go on until they prove the letters to have been in the hands of Mr. Tandy.—It is not worth taking up the time of the Court to enumerate the cases which are to be found. In Sydney's case the ground on which it was attempted was, that the paper writings were found on his table in his study*

Mr. *Browne* read the doctrine of evidence on comparison of hands from Gilbert's law of evidence?

Mr. *Mac. Nally*.—In Delamotte's case who was tried at the Old Baily for high treason.—

C. J. Where is that case reported.

Mr. *Mac. Nally*.—In the trials of the Old Baily.—I was present at the trial. The corporation of London pays a short hand writer to take down and report the proceedings of the Court. I say in De Lamotte's case the same objection was taken as has been taken here and the Court on the authority of the decision in Doctor Henefly's case reported in 1 Burrow 644, decided that such papers as were found in the possession of the prisoner and were proved to be in his hand writing by witnesses who had seen him write, should be read in evidence, but rejected as legal evidence, such papers as were not so found in the prisoners possession and could not be proved to be in his hand writing by those who saw him write.

Mr. *Mac. Nally* cited as determinations in point. Ld. Raymond's reports 39.—Skinner's reports

* The rule is laid down in Henefly's case in 1 Burrow.

reports 579, & 12 Viner 223. 3 State Trials 892.

Mr. *Recorder* cited—4 State Trials 271, 272.—3 Bacon's Abridgement 313.—2 Hawk. P. C. last edition 637.

Mr. *Prime Serjeant* contended that Mr. *Recorder* was endeavouring to induce the Court to a decision which he himself would not make in another court where he presided with so much honour to himself.

Mr. *Recorder*, Yes, I would reject such evidence.

Mr. *Prime Serjeant*. In sending a threatening letter by Post, the putting it into the post, and the proof of hand-writing is evidence, if not, it would be impossible to convict any man for that offence, and, it is not possible to prove the offence charged on the Traverser by any other means than the evidence offered.—Though such proofs as have been alledged might be required in High Treason, or other capital cases, it was not the practice to reject it for slight offences, like the present, which is merely a misdemeanour.—A person might write a threatening letter in his closet, and, unless by proof of the similitude of hand-writing it would be impossible to convict him.

Mr. *Emmet*. For the traverser stated the case of the seven Bishops, reported by Vaughan, he said it was the decided opinion of Mr. Justice Holloway (who was at that day the pride and the pillar of the court where he presided) that proofs ought to be stronger in criminal cases, than in civil ones, it is necessary to have a positive and substantial proof.

Lord Clonmel. If this doctrine be admitted I defy all human invention to prove the sending a challenge or provoking to fight against any man, the person delivering the letter being a party could not be examined to give evidence against himself.

The letter was read by the clerk of the crown and was as follows:

*To the Solicitor General, at Mr. Cusse's in Mer-
rion-street.*

"Sir,

"Understanding that you have thought proper to
"introduce my name into a debate in the House of
"Commons and treated it with marks of contumacy
"and contempt. I do not mean to make any observation
"on the propriety or impropriety of attacking a man
"who is not present to defend himself, but conscious
"that I never gave Mr. Toler any cause of offence.
"I am induced, to support my own honour, to send
"my friend Col. Smith to desire a fair and candid
"explanation of the following Query, did you or did
"you not mean to give me personal offence? this,
"sir, is a plain and simple question, and such as I con-
"ceive no gentleman can refuse answering.

"I am your very humble Servant,

"J. N. TANDY"

"Tuesday Evening 21st. Febr. 1792"

John Toler, Esq.

Mr. Prime Serjeant. Have you the answer?

A. I have it in my hand. I was industrious in not holding any conversation with Mr. Smith. I read the letter aloud in his presence, and told him I would commit my thoughts to paper, and then wrote the following answer, and read it aloud to Mr. Smith. As soon as I had read it, I directed it to James Napper Tandy, Esq.

Lord

[*The answer read.*]

"SIR,

"I have received your letter desiring an explanation of what fell from me in a late debate in the House of Commons. I have that sense of my own honour, and of the duty which I owe to the privileges of Parliament, that I cannot suffer either of them to be violated by giving an explanation of what I said on that occasion.

"I am your

"obedient servant

"J. TOLER."

Mr. Recorder. It is a very easy thing to get legal proof, if a man sends a letter or challenge to another, let the person who receives it go to the person that sent it, and ask him if he sent it, if he says he did, there is an end to the business the evidence is substantial.—There is no impossibility in proving legal evidence against a man for sending a letter or challenge: ask the person who delivers it if he received it from such a person, if he says he did, there is nothing easier than to go to the person who sent it, and ask him if he did send it.

Mr. Prime Serjeant. Go on.

Mr. Toler. Mr. Smith shook his head when he heard the answer read, and said, Sir, I am sorry to tell you the consequences of this business must be serious and disagreeable, I answered, Sir, I am sorry for it, but I am prepared for the event, and the sooner it is over the better; I told him that part of my family were in a very delicate state of health, and that since there was a necessity, I wished, as Mr. Tandy might wish, to avoid the inter-

intervention of Magistrates, or of the House of Commons, it should be as soon as possible.— Mr. Smith said, the naming the time and place are to be yours. I told Mr. Smith, since Mr. Tandy was not far off, not above 100 or 150 yards, that, perhaps, half an hour would not be disagreeable to him; he was, I understood, some where near the centre of Stephen's-green. I asked Mr. Smith if Mr. Tandy was ready, he said he knew nothing to the contrary, he supposed he was, and on my mentioning the time he said he would go and tell Mr. Tandy, and would return in a short time to tell me the result.

Q. Did you appear to have any sort of preparation?

A. There were either two or three cases of pistols lying on the table.

Q. You expressed a wish to have it over as soon as possible?

A. I did.

Q. You gave him the letter?

A. I did.

Q. When did he return?

A. He returned much later than I imagined, within the space of three quarters of an hour, and brought the following answer;

[Answer read]

“ SIR,

“ When I called for a plain and candid explanation of a very simple question, whether
 “ you did or did not mean me personal offence
 “ when you introduced my name into a debate
 “ in which I was not in the least concerned, I
 “ confess that I expected another answer than
 that

“ that which I have received, and that Mr.
 “ Toler’s good sense would have led him to it ;
 “ but if you will persist in refusing to answer the
 “ question, I must of course naturally suppose,
 “ that it was not only intended, but premeditated.”

“ I am your obedient servant,

J. N. TANDY.”

Q. You believe the letter to be Mr. Tandy’s
 hand-writing ?

A. I do.

Q. It appears to be dated the 22d.

A. It is.

Q. Were you disappointed at the answer you
 received.

A. I expressed my surprise to Mr. Smith, that
 he should be the bearer of such a letter, and that
 the day had been wasted in the manner it had,
 that, as Mr. Smith informed me, Mr. Tandy was
 in the neighbourhood or somewhere about
 Stephen’s-Green, I expected to have heard from
 him immediately ; that I thought the course of
 half an hour would have done, and in the course
 of conversation I mentioned the place might be
 somewhere in the fields near Merrion Square,
 and that if Mr. Tandy would call in the course
 of 10 or 15 minutes, I would not take any ad-
 vantage of his situation. Mr Smith went and staid
 away a considerable time, and returned with the
 best message I had received in the course of the
 day, which was, that Mr. Tandy would proceed
 no further in *that line*, that he considered it now
 not so much a *private* as *public* matter, and
 that he would commit it to the public prints. I
 desired Mr. Smith to tell him he must not blame
 me if the magistrates paid him a visit.—I made
 a very

a very low bow to Mr. Smith and told him I was very glad at what had happened, wished him a good morning, and had nothing more to do with Tandy. Mr. Cuffe with his usual politeness saw him down stairs. I heard nothing more of Mr. Tandy until the 4th of March.—I did not imagine I had given any offence, and doubted whether he was in joke or not.

Q. Did you receive any other letter on the 4th March?

A. I did and it is the hand writing of Mr. Tandy.

Q. How did you receive it?

A. I believe it came under cover to me delivered by a porter.

Cross Examined by Mr. Recorder.

Q. Where did you see the letter of the 4th of March first?

A. In Gardener's Row.

Q. Where do you think it was delivered?

A. I think it was delivered to the messenger by Mr. Tandy in the city of Dublin, for the letter desires an answer to be sent to No. 20, Chancery Lane.

Q. Was not Mr. Tandy committed by the House of Commons to Newgate for this business.

A. I know the reverse to be the case—he was committed for a breach of privilege.

When Mr. Toler had closed his evidence he addressed the Court hoping, as he said, that in case Mr. Tandy should be convicted that the sentence upon him might be lenient as possible.

Mr.

Mr. Emmet objected to reading the letter of the 4th of March, on the ground argued before by Mr. Recorder and Mr. Mac Nally, against reading the letter of the 22nd of February, that comparison or similitude of hand writing was not admissible evidence in criminal cases. The law requires the evidence to be much stricter in criminal than in civil cases. The only cases in which hand writing has been admitted in criminal cases are, where the papers have been found in the possession of the person, and the hand writing proved by some witness who had seen him write, and knew his hand writing.

In the case of Lord Preston, the circumstances were, he was found in the act of assisting a public enemy against the King. it was admitted there the papers were found with him, they were hid among his sails, and he expressed a wish to his officers to have them destroyed, they were in that case allowed to be evidence as having been found in his possession.

In the case of French in 6 St Trials, the evidence against him was a copy book, the part which was not his hand writing was read against him as well as the part which he had wrote, because he declared that it was a copy of his letter. The Chief Justice said, as he had confessed it to be part of his hand writing, they would therefore admit the whole.

In Laver's case, a case in which it was admitted that the prisoner used certain expressions before the Privy Council, when he was charged with the offence (which was considered as a confession) Mrs. Mason also proved she had received the papers from him
which

which was another reason for admitting the written evidence. The last case was that of Laurence Hensley, in Bur. 6. 44. It was rejected in the case of Lady Kerr. I have already mentioned the case of the seven Bishops Siderfin states though in civil cases comparison of hands is admissible evidence, yet in criminal cases it is not, and the King's Council never attempted to contradict the position. It is a species of evidence never attempted before in England. I submit it to you as a case of great authority. There is a similar decision in the case of Crosby. Raym. 39. in this case before the Court there is no evidence whatever of this letter being sent by Mr. Tandy. Suppose it was proved to you that any person saw him write it, what evidence is that to go to a Jury of the delivery. The crime is not in writing the letter but in sending it. Admitting he did write it. If I understand any thing of Law the fact must be positively proved that he sent it.—I really never before heard that the writing a letter constituted the offence.—In the present instance the inference rested only on a circumstance which was not in itself probable, that Mr. Tandy has sent those letters to Mr. Toler, because it was probable he had written them from the similitude of the hand writing to his. This amounts to nothing more than a presumption and what the law would call rash. Therefore I humbly hope the Court will not admit this paper as evidence.

The objection was over ruled by the Court and the letter was accordingly read by the Clerk of the Crown.—It was as follows.

“ Sir,

“Sir: I find myself under the necessity of addressing you once more on the affair, in which I am now concerned with you.—When I desired Colonel Smith to inform you, that I would appeal to the public, my intention was merely to put you under the necessity of calling upon me, as I think you must have done from the intended publication (which I have enclosed you*) and I preferred this mode from a full conviction that any other would subject me to the most rigorous prosecution, that Government could carry on, and to the several penalties of the law, while on your part it would be attended with perfect impunity. Disappointed in my expectation, by the rapidity of your manœuvres it becomes necessary to declare, that it never was or is it my intention to forego the private satisfaction to which I think myself entitled—I only wish to secure myself from the power of administration in case our meeting should have been attended with fatal consequences, and I now stand out against the Proclamation, solely for the purpose of obtaining a personal interview with you, to which I think you cannot have any objection, when I hope to convince you my courage is as unquestionable as your own.”

** Copy of the Intended Publication.*

“Mr. Napper Tandy finding that a servant of the Crown has wantonly introduced his name into public notice, and treated it with ridicule and contempt not only appeals to the tribunal of an impartial people whether it is consistent with the character of a gentleman, or a man of honour, to attack another where he has not an opportunity of defending himself, but thinks he is perfectly justified in declaring,----*That the said transaction is base and cowardly.*”

“I an-

" I anticipate the possibility of your laying this
 " letter before the House of Commons, a conduct
 " which although it may aggravate the punish-
 " ment that House may think fit to inflict for a
 " supposed breach of privileges, cannot I ima-
 " gine be grateful to your feelings as a man of
 " honour and a gentleman, and will not prevent
 " or deter me from that line of conduct
 " which the insult originally offered and the
 " steps subsequently taken renders absolutely
 " necessary."

" As the delivery of this letter, by any friend of
 " mine might subject him to disagreeable conse-
 " quences I hope you will excuse the mode
 " I have adopted, and be assured, that as soon as
 " possible, after my receiving your answer di-
 " rected to me No. 20 Chancery-lane, which
 " will be forwarded to me immediately, you
 " shall be attended by a gentleman who will
 " adjust every matter on my behalf.

I am, Sir,

Yours

" J. N. TANDY."

March 1st, 1792.

To John Toler, Esq.

The Right Hon. Mr. Cusse was produced and sworn.

Examined by Mr. Prime Serjeant.

Q. Do you remember the 22d of February?

A. I do.

Q. Do you remember any person coming to your house on that day?

A. Yes, Mr. Smith came and delivered a letter from Mr. Tandy to Mr. Toler.

Q. Do

Q. Do you know Mr. Tandy?

A. I do.

Q. Did Mr. Smith declare he brought the letters from Mr. Tandy?

A. He did.

Mr. Mac Nally here informed the Court that he was instructed by Mr. Tandy to admit the letters to have been written by him, and also to admit that he was with Mr. Smith on that day, (the 22d) and was conversing with him in the interval of the first and second visit of Mr. Smith to Mr. Toler.

Lord Clonmel. asked Mr. Tandy if that admission was according to his sentiments?

Mr. Tandy acknowledged the writing, the three letters, and that he sent the two first by Mr. Smith to Mr. Toler, that he would be sorry to deny any thing which had been so solemnly sworn to by Mr. Toler—that he admitted sending the two first letters, but Mr. Tandy added he had heard a number of facts sworn to by Mr. Toler, which he doubted not were true, but he never before had heard of them.

Here the Prosecution ended on the part of the Crown. Colonel Smith was produced on the part of Mr. Tandy, and examined by Mr. Mac Nally.

Q. Were you authorized by Mr. Napper Tandy to propose time and place for a meeting?

A. I was not.

Q. Inform the Court of the manner in which you used the words time and place to Mr. Toler?

A. Mr.

A. Mr. Toler said, I suppose Mr. Tandy has put his honour into your hands. I told him I acted as the friend of Mr. Tandy to require an explanation from Mr. Toler, but that Mr. Tandy was his own adviser.

Q. Lord Clonmel. What do you mean by the word friend, did you mean that of Mr. Tandy's second?

A. I meant that I was commissioned by Mr. Tandy to go to Mr. Toler to request an explanation of words used by him in the House of Commons, but I was not commissioned to deliver a direct challenge.

Chief Justice. What do you mean by a direct challenge.

A. I mean to call him out in order to fight Mr. Tandy.

Mr. Mac Nally. Q. You say not to deliver a direct challenge.

A. I do.

Q. What did Mr. Toler say to you when you told him you came to him as Mr. Tandy's friend?

A. Mr. Toler desired me to tell Mr. Tandy if he would call upon him, that Mr. Toler would not take any advantage of his situation, and that he would meet him in the course of ten or fifteen minutes.

Chief Justice. Did you deliver any challenge.

A. I did not.

Chief Justice. Am I to understand then that no challenge was delivered.

A. Certainly.

C. J. Q. How came it that the words "time and place" were mentioned by you to Mr. Toler?

A. When

A. When Mr. Toler refused to explain himself, I said I supposed that if Mr. Tandy did call upon Mr. Toler, that Mr. Tandy would leave the naming of the time and place to him (Mr. Toler.)

Q. Did you mention the conversation respecting the time and place to Mr. Tandy.

A. No.

Q. What was the reason?

A. I was afraid if I had Mr. Tandy would have met Mr. Toler, and the consequences might have been disagreeable.

Q. What gave you a reason for this fear?

A. I supposed it, as disagreeable circumstances are the natural consequences of refusing an explanation.

Q. Did you bring any answer, back to Mr. Toler.

A. Yes.

Q. What?

A. That Mr. Tandy now considered the business a public matter, and that he would appeal to the public prints.

Q. Then you understand that Mr. Tandy would wield his pen against Mr. Toler's pistols.

A. Yes.

Cross Examined by Mr Prime Serjeant,

Q. Did you say you were afraid the answer must be attended with disagreeable consequences?

A. I did.

Q. What were the grounds of these fears?

A. That Mr. Tandy would call upon him.

Q. Had

Q. Had you no other reasons?

A. No.

Q. Did you see the two letters?

A. I heard them read by Mr. Toler. I supposed from the nature of the letter, that Mr. Tandy wished for an explanation from Mr. Toler.

Q. When you delivered the verbal message of Mr. Tandy to Mr. Toler, "that he would proceed no farther in that line, but put the matter in the public prints," did you not understand that the message was that Mr. Tandy would no longer endeavour to provoke Mr. Toler to a duel.—

A. Certainly, that is the natural inference.—

Chief Justice. Q. am I to understand then that Mr. Tandy meant to put the Challenging on Mr. Toler.—

A. yes, my Lord.—

Chief Justice. do you mean that if Mr. Toler did not challenge Mr. Tandy, then Mr. Tandy would not challenge Mr. Toler.—

A. I do think Mr. Tandy at that time did not mean to challenge him.—

Chief Justice. did he mean so at any future time.—

A. I cannot say, my lord.—

Chief Justice. how do you reconcile this with your fear of disagreeable circumstances.—

A. I did not know at that time it was more dangerous to kill Mr. Toler than any other gentleman until after I had spoken to Mr. Tandy, It was his suggestion.

Justice Hewitt. did you not tell Mr. Toler, on his enquiry, that you believed Mr. Tandy was in the neighbourhood and ready.

A. I do not recollect to have told him so; it must be a mistake.—

Chief

Chief Justice do you think if Mr. Toler had challenged Mr. Tandy he would have fought him.

A. I do think he would, from the knowledge I have of Mr. Tandy's character.

Q. Did you tell Mr. Toler that Mr. Tandy did not intend to proceed further in that line, but to put the affair in the papers.

A. I did.

Here the evidence on both sides was closed

Mr. Recorder. Gentlemen of the Jury, the traverser stands indicted on seven counts. — 1st for that he intended to provoke the said John Toler to fight a duel, the second for sending a written challenge on 22d. Feb. at City of Dublin with an intent to provoke said John Toler to fight a duel with him, the said James Napper Tandy. The 3 other counts are for sending a challenge on 4th. March to provoke said John Toler to fight a duel with him the said James Napper Tandy.

Gentlemen, in my opinion, not one of the counts can be maintained by the evidence which has been produced. Mr. Tandy thought himself hurt by some expressions which had been made use of by Mr. Toler in the House of Commons, that in consequence of such expressions he wrote a letter to Mr. Toler, dated the 22d of February and I am persuaded, gentlemen, when you consider that letter you will find it does not contain a challenge.

Gentlemen, it appears to be a letter merely demanding an explanation, it is written from a person who declares he never had given any offence, and who calls on Mr. Toler to give a clear and a candid explanation of his conduct.

Gentlemen, if a man feels himself hurt by any
D expression

expression of another the natural consequences must be thus, he will wish to have an explanation. It appears clearly by the evidence which has been laid before you that the gentleman who carried the letter, (Mr. Smith) did not deliver any challenge, and gentlemen I am certain if a jury of Ensigns were to be taken out of the Barrack, they would consider the letter in the same light I am sure you will consider it. Gentlemen, if you look into the indictment it must clearly appear to you that the letter does not contain any challenge, nor was it intended as such, but that Mr. Tandy did expect that sort of an answer which Mr. Toler might have given to a gentleman of honour and spirit.—Gentlemen of the jury, what answer did Mr. Tandy expect,—he expected that as his feelings as a gentleman had been hurt by expressions which had been made use of by Mr. Toler, that he would give him the satisfaction of saying, that he did not intend to offend him when he used the words which he had thrown out against Mr. Tandy in the Parliament House, the answer he expected from Mr. Toler was certainly a very civil one, this appears to be the nature of the transaction as far as Colonel Smith was concerned. The party did not think fit to rest his case on the transaction of the 22d. February. The letter stated to have been delivered at the house of Mr. Toler in Gardiner's Row, has been made the subject of three of the Counts in the indictment, gentlemen it must be very clear to you that there has been no evidence sufficiently strong to support any one of the 7 Counts,—laid in the indictment.

Gentlemen, as for the letter received by Mr. Toler on the 4th. of March you cannot take any notice of that, for it appears to have been delivered

ed at Mr. Toler's House in the county of Dublin, as such you cannot take any cognizance of it.

Gentlemen, a jury of the City never can take any notice of a transaction which happens out of their jurisdiction; for, gentlemen, it is not in the power of his Majesty himself to authorise a Judge or a Jury to try an act committed out of the County for which they are sworn, and gentlemen though Mr. Toler was kind enough to say (without being asked) that he believed it was written by Mr. Tandy in the city of Dublin, you can only believe that he thinks so, and on which evidence you certainly cannot find him [Mr. Tandy] guilty. This letter is not to be perverted to support the other letters and counts in the indictment, and gentlemen, I am sure, when you read the letter of 22 Feb. and consider it, you will find no more in it than the desire of having an explanation, by a man who considered himself injured, and that it was merely to know if the expressions thrown out by Mr. Toler in the House of Commons was intended as a personal reflection or not. As to any thing he might have intended, that is not for your consideration, Gentlemen, he proceeded no further, which shews it was not his intention to challenge or to provoke Mr. Toler to fight, therefore, gentlemen, you are bound to do your duty under these circumstances as in the City, and not as in the County of Dublin. Under these circumstances, Gentlemen, I hope you will not hesitate to find Mr. Tandy Not Guilty.

There appears, gentlemen, another circumstance which I will lay before you;—it is this,—Mr. Tandy appears to have been made the object of the resentment of the House of Commons. It

happens that their *fulmen* is directed at the head of a single man. A citizen of character dragged as a criminal in the Streets of Dublin, and brought before the House of Commons, and sent from his family, his connections, and all that must be dear to a man, to the common Goal, no matter the length of time he remained there, a proclamation was issued against him, he was treated as a common culprit; this, gentlemen is not a mere trial between man and man for an offence committed against the law but is a trial between the indefinite privileges of the House of Commons, against a single individual.—Gentlemen if Mr. Tandy has offended, he has suffered for his offence, he has been imprisoned by the House of Commons and it is against all principles of justice that a man should suffer twice for the same offence.—this is not a mere case of indictment against Mr. Tandy for sending a challenge, but it is a prosecution set on foot for a breach of privilege, and for which the traverser has been already punished, I say to you remember it appears to be a prosecution carried on and supported against him by the House of Commons and pointed at an individual.—To convict Mr. Tandy of the offence laid to his charge, the counsel for the Crown, or rather for the House of Commons, must have proved their case more fully, I am sure before a jury of your respectability could never convict the traverser, you would require stronger proof than has been given to support any of the charges, I am sure, gentlemen you will presume every thing in favor of a man who has been already punished for a crime which he never committed.—It is very evident, gentlemen that they were not content with the proclamation—
though

though they considered it legal and if so they ought to have rested there, I am sure, gentlemen, your verdict will be such as will do you honor and shew you are not to be biased by either party.

Mr. Prime Serjeant replied.—When a grave gentleman, with a solemn form, addresses a jury, and when I consider the ability with which that gentleman frequently addresses them in the Court where he presides, I am surprised to hear him with such solemnity, tell the gentlemen of the jury that they ought to acquit the traverser.

I confess from the nature of the case I thought the traverser would have pleaded guilty.

Gentlemen, I will not trespass on your patience.—The traverser is indicted on seven Counts, in sending a written challenge to provoke Mr. Toler to fight a duel on the 22nd February.

Gentlemen I can only say, notwithstanding the able manner in which Mr. Recorder has addressed you, that if you can have any hesitation whatever to find Mr. Tandy guilty of the offence charged against him, *you are not the men I took you for.* If there ever was any intention to challenge or to provoke Mr. Toler to fight on the part of Mr. Tandy, and if you believe the evidence of Mr. Smith, there was an intention, I say if you believe the evidence of Mr. Smith, you must find him guilty.

I must also warn you against that gentleman, who himself so often warns you of your duty—I do not wish, nor is it necessary for me to enter into a law controversy with your learned Recorder.—I shall state to you the evidence of Colonel Smith, and, gentlemen, I am sure with such evidence

dence as has been already laid before you, you cannot hesitate to convict Mr. Tandy.

Mr. Smith says the reason of his first interview with Mr. Toler was for the purpose of calling for an explanation of words used by Mr. Toler in the House of Commons.—That having been refused the explanation, he thought the consequences might be disagreeable.—That he returned to Mr. Tandy with a written answer.—That Mr. Smith was apprized of the ill consequences, which might probably result from Mr. Toler not complying, that Mr. Toler told Mr. Smith if Mr. Tandy would call upon him in the course of ten or fifteen minutes Mr. Toler would not take any advantage of Mr. Tandy's situation.—Mr. Tandy certainly took the most likely means (which was his object) to provoke Mr. Toler to fight.—That he (Mr. Smith) returned with an answer that Mr. Tandy would not proceed in *that line* any longer.—I certainly have a very great respect for Mr. Smith, he had no doubt of what the consequences of it might be.—I allow gentlemen, that though the letter of the 4th of March might not be admitted as evidence, yet it ought to be taken by you, gentlemen of the jury, as an explanation of the transaction of the 22nd February.—If you do not believe Mr. Tandy's intention was to provoke Mr. Toler to fight you must disbelieve the evidence given by Colonel Smith. Gentlemen, the letter of the 4th of March will certainly go to shew what the intention of Mr. Tandy was. If the Jury are satisfied, and I should hope they will not be misled, they certainly must convict Mr. Tandy.—If the letter of 22nd of February was a challenge it certainly was not necessary for
Mr. Smith

Mr. Smith to deliver by word of mouth what he had delivered by letter.—See gentlemen of the Jury, if it is or is not a challenge. The strongest proof is that it was considered so by the person who carried it. And I would not desire a better person than Mr. Smyth to say whether it was or was not.—Mr. Tandy says in his letter, “in support of my honor I think it necessary to send my friend Mr. Smith for an explanation of the following query. Did or did you not mean to give me personal offence?—I allow this is a case that ought to have a fair and candid consideration from the gentlemen of the jury, and if you do not give every attention to the witnesses, his own acknowledgement of the facts must beyond a doubt convict the Traveller.

Here the Evidence closed on both sides.

Mr. Justice Hewitt, as Junior Judge, proceeded to sum up the evidence—and said—I cannot help saying I feel a satisfaction not to be expressed, that it is my lot to discharge my duty in a case so clear as the present.

The traveller is indicted on seven Counts.—It is for you to consider if any one of the counts have been fully proved to support the facts produced on the part of the Crown. (Mr. Justice Hewitt recapitulated the evidence to the jury.) Mr. Smith has told you that he went for an explanation of words made use by Mr. Toler in the House of Commons, that he was not aware of the danger of sending a challenge to a person of Mr. Toler's situation; that he was not at any time authorized

authorized to deliver a direct challenge—but it was the intention of Mr. Tandy to put it on Mr. Toler, the intention you are to consider was that to commit a breach of the peace.—If you believe the testimony of Mr. Smith, you must find the traverser Guilty, and if you do you must find him guilty generally.—If you think upon the whole of the evidence which has been laid before you it was not the intention of Mr. Tandy to challenge Mr. Toler to break the peace, you certainly must acquit him; the intention is for you to decide upon; you are, on your oaths, responsible to your posterity; you are not to be guided by the opinion of the House of Commons, you are to determine upon what you believe upon your oaths.

Chief Justice concurred with Mr. Justice Hewet, and charged the jury that if they believed the evidence they must certainly find him guilty, and that if they thought him guilty on any *one* of the Counts they must find him guilty generally. That it was the duty of the Court to proportion the punishment to the degree of guilt supported by the evidence. Mr. Recorder said, with deference, he hoped his Lordship would charge the Jury to find the traverser guilty only on particular counts, if they do not think him guilty of all, which they certainly cannot do, as both the count and the council for the crown agree, that the Court relative to the letter of the 4th March, could not be supported.

Chief Justice. I cannot by any means. Mr.

Mr. Recorder stated the consequences which must naturally arise from charging to find guilty generally when the traverser might be only guilty of one or two Counts, then if the Jury were to find generally, the traverser would be liable to punishment, for any or all the Counts in the Indictment.

Chief Justice then charged the Jury to find Guilty particularly in the 4th Count.

The Jury retired, and after remaining in the Jury-room for an hour and forty minutes, brought in a Verdict **NOT GUILTY**.

F I N I S.

E. A. G. P.

1/16/06

Mr. Justice, having the consideration which
must naturally arise from charging a man guilty
generally when the traveler might be only
guilty of one or two Counts, then if the Jury
were to find generally the traveler would be
liable to punishment for any or all the Counts
in the indictment.

Chief Justice then charged the Jury to find
Guilty or not guilty in the four Counts.

The Jury retired, and after remaining in the
Jury-room for an hour and forty minutes
returned and said they were unanimous for
the Verdict.